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No.

In The

Supreme Court of the United States

October Term, 1980

UMBERTO LOMBARDO T/A UMBERTO'S OF NAPLES,

Petitioner,

vs.

SYLVIA MAYER and EDWARD MAYER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY

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QUESTIONS PRESENTED FOR REVIEW

1. If the Court denied the Petitioner his rights of due process in a civil proceeding as guaranteed under the Fourteenth Amendment of the United States Constitution, Section 1 when it failed to set aside the Judgment and vacate the Default entered against the Petitioner thereby allowing the Petitioner to file an Answer so that the case could be heard on the merits, where the Petitioner denied being served with a copy of the Summons and Complaint and where the Respondent failed to produce an affidavit or any proof of service other than the Sheriffs' Return.

2. If the refusal of the Court to draw adverse inferences from the failure of the Respondent to produce the Deputy Sheriff on the issue of service, or her previous attorneys to confirm the content of their conversations with the Petitioner prior to

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filing of the Summons and Complaint is discriminatory in nature, denying equal justice under the law, prohibited by the Fourteenth Amendment of the United States Constitution, Section 1 and therefore resulted in substantial injury to the legal rights of the Petitioner.

3. Whether the Court in accepting as fact certain statements sworn to in an affidavit by the Respondent describing events and conversations including an alleged offer of a settlement involving the Petitioner which Respondent subsequently admitted having no personal knowledge of neither did she produce any proof to substantiate the pure conjecture set forth in the affidavit, did apply and administer the law with an unequal hand thereby depriving the Petitioner of his right to due process of law, under the Fourteenth Amendment of the United States Constitution Section 1 in favor of the Respondents.

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STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The determination sought to be reviewed is the result of a Plenary Hearing granted on the application of the Defendant-Petitioner, Umberto Lombardo, to set aside Judgment and vacate default permitting Defendant to file an Answer allowing the case to be heard on the merits. The determination denying the Defendant's motion was rendered by the Honorable Edward F. Neagle, Jr., on December 19, 1979. The Order denying the application was signed by the Superior Court of New Jersey, Law Division — Essex County on December 26, 1979.

The Plaintiffs-Respondents, Sylvia Mayer and Edward Mayer, instituted suit against the Defendant-Petitioner, Umberto Lombardo, t/a Umberto's of Naples, in the Superior Court of New Jersey, Law Division — Essex County, bearing docket number

L207073, on September 24, 1973.

No answer was filed by the Defendant and default was duly entered. Judgment was thereafter entered and docketed in June of 1974 in the amount of $17,500.00. A Writ of Execution was thereafter directed to the Sheriff of Essex County and property located at 567 Washington Avenue, Belleville, New Jersey, owned by the Defendant was levied upon in August of 1979.

A Notice of Motion was thereafter filed by the Defendant, through his attorney, Joel C. Rinsky, P.A., returnable on October 26, 1979 seeking an Order vacating the Judgment and permitting the Defendant to file an Answer and restraining the Plaintiffs and the Sheriff of Essex County from proceeding with the Sheriff's Sale, then scheduled for October 30, 1979 along with accompanying Affidavit.

Answering and Reply Affidavits were thereafter filed and the Motion was thereafter heard by the Honorable Edward F. Neagle, Jr., on November 2, 1979. On the return date of the Notice of Motion, the Court determined that a Plenary Hearing should be granted on the Defendant's application and the matter was thereafter heard commencing November 29, 1979.

Subsequent to the Order denying Defendant's application, a Notice of Appeal was filed for the Defendant on January 8, 1980. A stay of the Sheriff's Sale on the execution of the Defendant's realty located at 567 Washington Avenue, Belleville, New Jersey, was granted on February 15, 1980, pending determination of the Appeal subject to certain terms and conditions which have heretofore been met. The Appeal, docket number A-1692-79, was submitted December 22, 1980. On December

31, 1980, Judges Seidman and Antell affirmed for the reasons stated by Judge Neagle in his oral opinion.

An "Application for Extension of Time for Filing Notice of Petition as Within Time" was filed by the Defendant, appearing pro se in this matter, with the Supreme Court of New Jersey on March 23, 1981. The Order denying the motion for leave to file the notice of petition for certification as within time was filed by the Supreme Court of New Jersey on April 15, 1981.

An order to extend the time for filing a petition for a writ of certiorari with the Supreme Court of the United States, in the afore-entitled case to and including May 30, 1981 was dated March 31, 1981 and signed by Justice William J. Brennan, Jr.

The Petitioner invokes the jurisdiction of this Court to review the Order of

the Superior Court of New Jersey denying Petitioner's application to set aside Judgment and vacate default. Said Order denying the application was signed by the Court on December 26, 1979. The Petitioner contends that the Judgment entered as a result of default was a miscarriage of justice since he maintains that although he was shown a copy of the Sheriff's Return of Service, he had no recollection of receiving such Summons and Complaint. He further denied any recollection of anyone coming to his alleged place of business where the Summons and Complaint was allegedly served on "Umberto's of Naples" and individually on Umberto Lombardo, during the year in question, 1973, and handing him any papers in reference to the law suit.

Testimony in support of Defendant-Petitioner, Lombardo's position given by Caterina Poto, the manager of the business

in question, Zodiac Beauty Salon also known as Umberto of Naples, in the year 1973, substantiated the claim that although Mr. Lombardo was on the business premises on occasion, he was not employed at that business during 1973. Mrs. Poto went on to testify that there were other men employed there at that time who she had hired. Mrs. Poto also testified that she knew nothing about any law suit started by the Plaintiff-Respondent, Sylvia Mayer, until August of 1979 and denied that she had received any legal papers in reference to this law suit at any time up to August of 1979 and that during the year 1973, while she was the manager of Zodiac Beauty Salon, she had never received any legal papers in the law suit instituted by the Plaintiff. According to this witness, she did not leave the business premises during working hours, not even for lunch in the year 1973.

Therefore, the Defendant-Petitioner was unaware, through no fault of his own, of the Complaint filed against him and the judgment sought; neither was he aware of the default that was duly entered nor the Judgment thereafter entered and docketed in June 1974 in the amount of $17,500.00.

The contents of the Notice of Motion and Affidavit attached thereto filed with the Superior Court of New Jersey on October 12, 1979 and the stenographic transcript of the proceedings of the Plenary Hearing, demonstrate the intention of Defendant, Lombardo, to request only that his legal right to due process of law be granted by seeking an Order to set aside Judgment and vacate default permitting him to file an Answer. During the course of the Plenary Hearing, heard by the Honorable Edward F. Neagle, Jr., commencing November 29, 1979, Mr. Lombardo continued to deny any knowl-

edge of the lawsuit or Judgment prior to August of 1979. The denial of the Defendant concerning the service of the Summons and Complaint as well as the corraboration by a witness even in the face of the failure of the Plaintiff, Mrs. Mayer to produce an affidavit or any proof of service other than the Sheriff's Return was dismissed by the trial Court in its determination to deny the Defendant's application to set aside Judgment and vacate default.

Further, in reaching the afore-mentioned decision, the trial Court considered as fact speculation by the Plaintiff, set forth in an Affidavit, concerning the circumstances of the service of the Summons and Complaint on the Defendant and conversations between Defendant, Lombardo and Plaintiff, Mayer's previous attorneys including an alleged offer of a Settlement in the amount of $10,000.00 which Mr.

Lombardo denied.

Plaintiff admitted under cross examination at the Plenary Hearing that she had no personal knowledge of the circumstances of the service of the Summons and Complaint on the defendant. There is in fact a discrepancy in the dates of service which Mrs. Mayer swore to be personally familiar with and the date of service appearing on the actual Sheriff's Return.

Concerning any conversations between Defendant, Lombardo and the previous attorneys retained by Plaintiff, Mayer, Mrs. Mayer admitted having no personal knowledge of any such conversations and failed to produce either of the attorneys or any other evidence to establish the nature of these conversations or to confirm her allegation of a settlement offer by the Defendant.

The trial Court failed to draw any negative

inferences from the afore-mentioned circumstances in making its determination to deny the Defendant's application to set aside Judgment and vacate default.

It is the conclusion of the Petitioner that the afore-mentioned determination was prejudicial in that it denied the Defendant-Petitioner his opportunity to be heard respecting the justice of the judgment that was sought, resulting in substantial injury to Petitioner's legal rights with the loss of his property.

Therefore, Petitioner humbly requests the Supreme Court of the United States to review the final determination of the Superior Court of New Jersey.

THE CONSTITUTION OF THE UNITED STATES

FOURTEENTH AMENDMENT

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

In the case presented in this Court, Petitioner contends that the serving process utilized by the Sheriff of Essex County in the State of New Jersey on October 9, 1973, the date when the Sheriffs' Return indicates service of one Summons and Complaint on a business referred to as Umberto's of Naples and another on an individual named as Umberto Lombardo, was insufficient so as to ensure the acquaintance of all parties of the in-

stitution of proceedings.

Due to Petitioner's ignorance of the Complaint against him, a default was entered and thereafter a Judgment was entered and docketed in the amount of $17,500.00 in June, 1974. Petitioner was denied his right to file an Answer being afforded neither notice nor an opportunity to participate in the proceedings affecting his interests. The Fourteenth Amendment Section 1 of the United States Constitution guarantees protection of the interests of citizens that they may not be impaired by an order resulting from litigation concerning which he was afforded neither notice nor an opportunity to participate.

Subsequent to June, 1974, when Judgment was duly docketed in the office of the Clerk of the Superior Court of New Jersey, no action was taken on behalf of the Plaintiffs to satisfy the Judgment until June,

1979 when a Writ of Execution was directed by the Superior Court of New Jersey at Trenton to the Sheriff of Essex County and property located at 567 Washington Avenue, Belleville, New Jersey was levied upon in August of 1979. Defendant was unaware of the Judgment for five years, learning of it only after the Notice of Sheriffs' Sale appeared in the newspaper during the month of August, 1979.

The Fourteenth Amendment to the United States Constitution, Section 1, protects the citizen from being deprived of his property by an order in a case in which he neither appeared, nor was served or effectively made a party.

LAW

IT WAS ERROR AND AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO FAIL TO SET ASIDE THE JUDGMENT AND TO FAIL TO VACATE THE DEFAULT ENTERED AGAINST THE DEFENDANT WHERE THE DEFENDANT DENIED BEING SERVED WITH A COPY OF THE SUMMONS AND COMPLAINT AND WHERE THE PLAINTIFF FAILED TO PRODUCE AN AFFIDAVIT OR ANY PROOF OF SERVICE OTHER THAN THE SHERIFF'S RETURN.

The case cited by Defendant was Goldfarb v. Roeger, 54 N.J. Super 85 (App. Div. 1959), where a Judgment by Default had been entered against the Defendant, Roeger. Roeger later had the Judgment vacated for lack of service due to the fact that even though there had been an Affidavit of the Deputy Sheriff, it was diametrically opposed to his own and the Deputy Sheriff was not produced at the oral hearing that had been granted to Defendant, Roeger.

The Court re-stated the law of the State of New Jersey by setting forth that,

In this jurisdiction, it is settled that the strict English common-law rule does not prevail, and the Sheriff's return is not conclusive. Sweeney v. Miner, 88 N.J.L. 361, 366 (E & A 1915); C & D Building Corporation v. Griffithes, 109 N.J. Eq. 319, 323 (Ch. 1931); Atlantic Mortgage Co. v. Rosenfeld, 2 N.J. Misc. 861 (Ch. 1924). Although it is rebuttable, the Sheriff's return is part of the record and raises a presumption that the facts as therein recited are true. Hotovitsky v. Little Russian Greek Catholic St. Peter & Paul Church, 78 N.J. Eq. 576, 577 (E. & A. 1911); Seymour v. Nessanbaum, 120 N.J. Eq. 24 (Ch. 1936) (set aside only on "clear and convincing" evidence that return is false); Blair v. Vetrano 12 N.J. Misc. 462, 172 A. 604 (Sup. Ct. 1934) (evidence held insufficient); Vredenburg v. Weidmann, Supra, 14 N.J. Misc. at page 287 (entitled to every presumption of its correctness); 5 Wignore, Evidence (3d ed. 1940), s1664 (b), p. 652. Cf.N.J.S. 2A:15-24. It is generally held that the uncorroborated testimony of the defendant alone is not sufficient to impeach the return. 72 C.J.S. Process S102b, p. 1145 at page 90.

The Court then set forth the burden of proof as follows:

> . . . Whether the evidence adduced at the oral hearing below is so 'clear and convincing' as to impeach the Sheriff's return of service and the affidavit in support thereof. (at

page 90)

As was stated in Goldfarb v. Roeger, Supra:

> . . . We cannot discount plaintiff's unexplained failure to produce the deputy to establish the truth of his return and to withstand the rigors of cross-examination, as did the Roegers. (at page 91-92)

LAW

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE DEFENDANTS' APPLICATION TO HAVE THE JUDGMENT SET ASIDE AND THE DEFAULT VACATED PURSUANT TO RULE 4:50-1.

Rule 4:50-1 provides for relief from a Judgment for the following reasons:

(a) mistake, inadvertence, surprise, or excusable neglect;

(b) newly discovered evidence which would probably alter the judgment, order or proceeding and which by due diligence could not have been discovered in time to move for a new trial under R. 4:49;

(c) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(d) the judgment or order is void;

(e) the judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or

(f) any other reason justifying

relief from the operation of the judgment or order.

Rule 4:50-2 provides that:

> The Motion shall be made within a reasonable time, and for reasons (a), (b), and (c) of R. 450-1 not more than one year after the judgment order or proceeding was entered or taken.

Defendant has moved under Rule 4:50-1(f). In the case of Hodgson v. Applegate 55 N.J. Super 1 (App. Div. 1959), on a similar application to set aside a judgment and vacate the default, the Court stated that it must keep in mind that relief under Rule 4:62-2 (predecessor to present Rule) "rests within the sound discretion of the trial Judge and is to be dispensed or withheld according to equitable principles." at page 20.

The Court went on to state that:

> We eschew an attempt to set forth with any particular degree of specificity the precise meaning of the concededly broad terms of subsection (a). And any effort to mark the outer limits of the catch-all provision in Subsection (f), providing for relief for 'any other reason justifying a relief from

> the operation of the judgment or order', would similarly defeat the manifest purpose of the rule to ensure a discretionary appraisal of the facts of the particular case. (at page 20)

In the case of Finkel v. Cumberland Realty Co. 69 N.J. Super 85 (Ch. Div. 1961), the Court stated its philosophy that,

> The oft-quoted maxim that 'every man is entitled to his day in court' has long been applied with diligence in this jurisdiction. (at page 93)

In the case of Keller V. County of Somerset 137 N.J. Super 1 (App. Div. 1975), the Court stated that,

> . . . an application to vacate a default judgment is addressed to the sound discretion or the court and that, once again, equitable considerations apply. In passing on such an application, the court will indulge a reasonable excuse and resolve all doubts in favor of the application to the end of securing a trial on the merits and a just result. (at page 11)

LAW

THE TRIAL COURT'S REFUSAL TO DRAW ADVERSE INFERENCES FROM THE FAILURE OF THE RESPONDENT TO PRODUCE THE DEPUTY SHERIFF ON THE ISSUE OF SERVICE, OR HER PREVIOUS ATTORNEYS TO ESTABLISH THE NATURE OF THEIR CONVERSATIONS WITH THE DEFENDANT WAS REVERSIBLE ERROR.

In the case of State v. Clawans, 38 N.J. 162 (1962), the Court held that,

> Generally, failure of a party to produce before a trial tribunal proof which, it appears, would serve to elucidate the facts in issue, raises a natural inference that the party so failing fears exposure of those facts would be unfavorable to him. (at page 170)

EXPLANATORY NOTE

Due to the fact that there are a number of different dates upon which testimony was taken and the pages of the transcript are not numbered consecutively, the references to the transcripts are designated by page and line followed by the date of that particular transcript of testimony.

Since there was no oral testimony taken by the Superior Court of New Jersey, Appellate Division, all references to transcripts of testimony refer to the transcripts of proceedings by the Superior Court of New Jersey, Law Division — Essex County. The proceedings constituted a Plenary Hearing granted by the Superior Court on a Notice of Motion filed by the Defendant-Petitioner.

STATEMENT OF CASE

The Petitioner, Umberto Lombardo, is 41 years of age is married and resides in Nutley, New Jersey. He has resided in the United States for approximately 20 years. His education is limited, having gone up to the eighth grade in public schools in Italy. According to the Petitioner, he cannot read English well and has to have letters or other correspondence, read to him.

During the year 1973, there was a beauty salon located at 547 Washington Avenue, Belleville, New Jersey, known as Zodiac Beauty Salon, E.I. #22-1949472. According to Petitioner, the sign Umberto of Naples did not go up until 1974.

According to Petitioner, Lombardo, he was unemployed during the year 1973 but did admit being present upon the business

premises from time to time. Defendant did admit that during the year 1973 he was cutting some hair at the Zodiac Beauty Salon and cut almost all men's hair, cutting a number of heads at no cost in order to gain experience.

The statements concerning Mr. Lombardo's activities during 1973 were corroborated by the testimony of Caterina Poto, manager of Zodiac Beauty Salon during the year 1973 (T40, L5-21, 11/29/79). Mrs. Poto testified that the owner of Zodiac Beauty Salon was Elena Lombardo (T37, L21-23, 11/29/79). Mrs. Poto testifed further that there was no sign on the business premises in 1973 in the name of Umberto's of Naples, the sign for Umberto of Naples went up in 1974 (T43, L8-16, 11/29/79).

The Defendant-Petitioner has denied ever seeing the Plaintiff prior to the Superior Court of New Jersey hearing in

November of 1979 and denied ever working on the Plaintiff's hair. The testimony of witness, Mrs. Poto stated that Defendant, Umberto Lombardo did not give any permanents to women or do any women's hair coloring (T41, L10-11, 11/29/79; T50, L1-4, 11/29/79).

Defendant-Petitioner was contacted by telephone some time in 1973 by a lawyer named Allen Marra and was told to come to that attorney's office. When he arrived at the attorney's office, Defendant claims that he did not understand much of the conversation but thought that it was in reference to a claim that some individual fell at Zodiac Beauty Salon. Thereafter, Defendant believes that he again went to that attorney's office in 1973 and was told that a lady fell and got hurt and that she fell at Umberto's of Naples.

Defendant had some recollection of

thereafter going to see another attorney by the name of Mr. Piro, some place in Nutley, New Jersey, in reference to this matter and recalled that he was told that some lady got hurt and denied that there was any conversation on that date, or ever, in reference to settling the claim for $10,000.00. When he went to Mr. Piro's office, he went by himself, without an attorney and without an interpreter (T18, L8-12, 11/29/79) and no interpreter was supplied to him and the Defendant did not understand what was taking place.

When the Defendant went to speak to the attorney, he did not know whether somebody got hurt in the salon or outside in the street.

In an Affidavit filed October 18, 1979, the Plaintiff, Sylvia Mayer, swore that "Umberto Lombardo was actually aware of the entry of this Judgment in 1974. On

August 4, 1974 he was individually served with a Petition and Order for Discovery compelling him to appear in the office of James Piro, Esq., 228 Franklin Avenue, Nutley, New Jersey at 9:00 o'clock." Mrs. Mayer went on to state, "Mr. Lombardo appeared at this supplemental proceeding, understood what was happening and adamantly refused to answer any questions." The next statement in Plaintiff's Affidavit reads, "After that, Allen C. Marra, Esq., my attorney at that time, had numerous conversations with Mr. Lombardo. In fact, Mr. Lombardo appeared at his office in October 1974 and offered $10,000.00 to settle this case."

The question of the authenticity of the statements made in this Affidavit was first raised by the attorney appearing for Mr. Lombardo, Joel C. Rinsky, P.A., during the course of the Plenary Hearing. Counsel

challenged the statements by asking Plaintiff if she were present at the office of James Piro, Esq., on August 4, 1974, thereby having personal knowledge of the circumstances to which she had sworn being personally familiar with. Plaintiff, Sylvia Mayer admitted during the cross-examination that she was not present and that her statements were based only upon what her attorney may have told her (T19, L18-25, 12/19/79, T20, L1-3, 12/19/79).

During the cross-examination, Mrs. Mayer went on to admit that she was not present at any time when any discussion took place between any attorney that she had retained and the Defendant, Umberto Lombardo. (T20, L4-17, 12/19/79).

The Plaintiff, Mrs. Mayer, testified that she had her hair colored on June 9, 1973 in the Defendant's beauty salon in Belleville, New Jersey. Although the

Plaintiff testified that the name that she saw was Umberto's of Naples, she also testified that subsequent to the incident, she had to look up the name and address of the beauty salon for her attorneys (T17, L12-22, 12/19/79). She also testified that she never went back to the beauty salon to make any complaint after June 9, 1973 (T18, L10-12, 12/19/79).

In closing argument, Counsel emphasizes the point that there were witnesses missing on the Plaintiff's side of the case. Counsel requested the Court to recall the allegations contained in the original Affidavits submitted in this case that Defendant, Mr. Lombardo, knew something about this case after 1973 by some interviews of him with two attorneys, and accordingly the Plaintiff didn't bring anyone in to testify as to what the conversation was between this man and the Defen-

dant, and it shows that he did meet with an attorney, probably in 1974, but that he did not know what that was about and he did not understand that there was any type of proceeding going on. The Plaintiff could have brought in testimony either of one or both of those attorneys to attempt to establish that the Defendant did know what was going on and yet the Plaintiff failed to bring forth any such testimony (T41, L14-25, 12/19/79; T42 L1-4, 12/19/79).

The issue at hand concerning the conclusions to be drawn from the Plaintiff's failure to substantiate any of the serious allegations set forth in her Affidavit by presenting to the Court any proofs thereof was passed upon by the Superior Court of New Jersey, Law Division — Essex County in the oral decision of the Honorable Edward F. Neagle, Jr., in the following Manner:

> . . . that he went to a lawyer's office on three occasions, each time

> he 'dummies up' and falls back on the claim that he doesn't understand English, that he can't read English, he didn't know what they were talking about. He knew exactly what was going on at all times and he chose to ignore the summons and complaint and like so many others it isn't until wages are executed upon, or levied upon, or assets are attacked in one way or another, did he ever come forward. (T60, L21-25, 12/19/79; T61, L1-5, 12/19/79).

The decision further stated:

> It certainly seems to me that once having gone to the lawyer's office, as Mr. Lombardo indicates that he did, and not understanding what they were talking about, that when he got a call to come back the next time, if he couldn't read or understand English, that he would have taken along someone who could. What was the sense of going the second and third time if the man didn't understand what was taking place each time that he went there? (T61, L23-25, 12/19/79; T62, L1-6, 12/19/79).

The Court in rendering its determination made no reference to the fact that Plaintiffs failed to provide any evidence to indicate the nature of the conversations between the attorneys retained by the Plaintiff and the Defendant allegedly

concerning the law suit. The Court did not respond to the questions raised by Defendant in connection with the conclusions to be drawn by the absence of evidence to corroborate the statements sworn to in the Affidavit filed by the Plaintiff. The decision by the Superior Court of New Jersey also made no mention of the issue brought to its attention in regard to the Court's consideration of the fact that the Plaintiff made sworn statements concerning the conduct of the Defendant and the nature of the afore-mentioned conversations between Defendant and attorneys retained by Plaintiff, to which she was admittedly not a party thus having no first-hand knowledge thereof.

In the brief prepared for the Appellate Division for the Defendant, it was pointed out that, "The failure to call these attorneys, by the Plaintiff, should

have resulted in the drawing of an inference that their testimony would have been unfavorable to the Plaintiff." (p. 23, L12-15)

The decision rendered by the Appellate Division on December 31, 1980 simply upheld the previous decision, per curiam, for the reasons stated by Judge Neagle in his oral opinion.

Subsequent to these conversations, Defendant did not hear anything further and was unaware that a Judgment had been entered against him until August of 1979 when he learned from friends and neighbors that a piece of property he owned was being advertised for a Sheriff's Sale (T14, L6-8, 11/29/79).

In the brief prepared for the Appellate Division for the Defendant, the point was made that the Defendant has never

been given an opportunity to defend this matter on the merits or have his day in court.

> There are substantial issues in dispute as to whether the Defendant did any work on the Plaintiff's hair with the testimony being diametrically opposed on this issue. To deny the Defendant his opportunity to have this matter determined on the merits, constituted an abuse of discretion. (p. 19, L25-27; p. 20, L1-4)

The decision rendered by the Appellate Division on December 31, 1980 simply affirmed the previous determination, per curiam, for the reasons stated by Judge Neagle in his oral opinion.

Defendant denied ever being served with any papers from the Court during the year 1973 at which time he was living in Nutley, New Jersey. Defendant denied that he was the owner of the Zodiac Beauty Salon during 1973 and denied any recollection of anyone coming to the Zodiac Beauty Salon in

1973 and handing him any papers in reference to the law suit and denies ever receiving a copy of the Summons and Complaint. Mrs. Poto, manager of Zodiac Beauty Salon during the year 1973, also denied that she had received any legal papers in reference to this law suit at any time up to August of 1979 (T45, L6-12, 11/29/79).

The question of service of the Summons and Complaint is a fundamental issue regarding the right of the Defendant to file an Answer thereby exercising the Constitutional provision of the Fourteenth Amendment which guarantees due process of law.

Counsel for the Defendant contested the Plaintiff's assumption that Defendant, Mr. Lombardo, knew about the Judgment from 1974 while Mr. Lombardo's Affidavit clearly indicated that he did not have any know-

ledge of any Judgment against him. The point was made that there was a return of service filed with the Sheriff's Department of Essex County, however Counsel argued that it was not conclusive (T11, L14-23, 11/2/79). "There is a Sheriff's Return that says papers were served on somebody purportedly being Umberto Lombardo."

In closing argument, Counsel for the Defendant submitted to the Court the point that although he had the burden on behalf of the Defendant of going forward with proofs, that the Plaintiff had some obligation as far as proofs also and that the Plaintiff for example, cannot say to the Court, "We have a return of summons signed by a deputy sheriff and therefore, it is conclusive proof that Umberto Lombardo was served with legal documents." Umberto Lombardo denied on the stand that

he ever received such documents (T38, L3-12, 12/19/79).

Counsel for the Defendant then referred the Court to Goldfarb vs. Roeger, 54 N.J. Super., page 85. On page 86, wherein it was stated "On motion to set aside a default judgment on the grounds that defendant was never personally served with process, where Plaintiff produced no witnesses at the hearing but rested upon the Sheriff's return of summons and the affidavit of a deputy and failed to produce the deputy to establish the truth of the return, an adverse inference against the Plaintiff was justified that the testimony of the deputy would have been unfavorable." Counsel suggested to the Court that that inference could be drawn here. There has been submission of nothing to establish service other than the return of service made in October of 1973 (T38, L18-25,

12/19/79; T39, L1-6, 12/19/79).

In addition to that, Counsel for the Defendant cited the case of Finkel vs. Cumberland Realty Co., 69 N.J. Super., at page 93, the Court stated its philosophy that:

> The oft-quoted maxim that 'every man is entitled to his day in court' has long been applied with diligence in this jurisdiction

Counsel offered his opinion that when the Court enters a Judgment entered as a result of a default the Court should keep in mind the maxim also that whenever possible a person should have their day in court so that the matter can be determined under the merits and not as a result of a forfeiture because there has been a non-appearance. (T40, L12-25, 12/19/79).

Lastly, Counsel cited the case of Keller vs. County of Somerset, 137 N.J.

Super., page 1 at page 11, wherein the Court stated the application to vacate a default judgment is addressed to the sound discretion of the Court and that equitable considerations apply. In passing on the application, the Court will "indulge a reasonable excuse and resolve all doubts in favor of the application to the end of securing a trial on the merits and a just result" (T41, L1-13, 12/19/79).

The Superior Court of New Jersey in stating its decision passed upon the question of whether the Defendant would be denied his right to due process of law if the Court denied his application to set aside judgment and vacate default, by quoting a determination by the Court in the Goldfarb case cited by the Defendant.

> In Goldfarb the Court also held that, 'The uncorroborated testimony of the defendant alone is not sufficient to impeach the return. The first question before the Court is whether

or not the trial judge soundly determined that the Defendant should be held to have been served. This requires a determination as to whether the evidence adduced at the oral hearing below is so clear and convincing as to impeach the Sheriff's return of service and the affidavit in support thereof.' In the Goldfarb case there was an affidavit, in this case we don't have an affidavit, we have a return of service. I deem that there is a presumption of service from the return itself and the question then becomes is whether the testimony is so 'clear and convincing' as to impeach the Sheriff's return (T58, L7-25, 12/19/79; T59, L1-8, 12/19/79).

The oral decision then went on to state the denial of the motion,

I have no difficulty in determining that the presumption of valid service has not been overcome by 'clear and convincing evidence' or by any type of credible evidence whatsoever. I have no difficulty in saying that as a result of having observed the demeanor, the manner in which Mr. Lombardo testified and considering his candor and frankness or more particularly his lack of it, I am denying this motion (T60, L3-10, 12/19/79).

The Court did not comment on the Plaintiff's failure to produce an affi-

davit or any proof of service other than the Sheriff's return, neither did the Court comment on the cases cited by the Defendant to establish precedents for the Court allowing matters to be heard and determined on the merits and not permitting a judgment to stand that has been entered as a result of a forfeiture because there has been a non-appearance wherever possible.

In the brief prepared for the Appellate Division on behalf of the Defendant, the following point was made:

> In addition, the failure of the Plaintiff to call the Deputy Sheriff who had supposedly served the Summons and Complaint upon the Defendant, or to produce any proof as to the unavailability of that Deputy Sheriff, should have resulted in an adverse inference (p. 23, L16-22).

The decision rendered by the Appellate Division on December 31, 1980 only affirmed the previous determination, per curiam, for the reasons stated by Judge

Neagle in his oral opinion.

ARGUMENT FOR ALLOWANCE OF WRIT

The Petitioner invokes the jurisdiction of the Supreme Court of the United States of America for the allowance of a Writ of Certiorari due to the contention that the trial court in rendering its final determination to deny the Petitioners' Application to Set Aside Judgment and Vacate Default, did act with prejudice, applying the law with an unequal hand, in a discriminatory manner in favor of the Respondents. This action did deprive the Petitioner, Umberto Lombardo, a naturalized citizen of the United States, of the rights guaranteed him, the privileges of citizenship, specifically the privileges of Due Process and Equal Protection.

The initial indication of prejudice appears in the transcript of the Oral Decision of the Honorable Edward F. Neagle, Jr. (T60, L3-6, 12/19/79) when he states

that he had "no great difficulty in determining that the presumption of valid service has not been overcome by 'clear and convincing evidence' or by any type of credible evidence whatsoever."

The trial court refused to draw any adverse inference from the failure of the Plaintiffs-Respondents, Sylvia Mayer, and Edward Mayer to either produce the Deputy Sheriff himself or an Affidavit from the Deputy Sheriff to prove that the Summons and Complaint was served upon Defendant-Petitioner.

Further, the Petitioner, Umberto Lombardo, swore upon his oath in an Affidavit dated October 12, 1979 that although he had been shown a copy of a Sheriffs' return indicating service upon him of a Summons and Complaint on October 9, 1973, he had no recollection of receiving such Summons and Complaint. The Petitioner re-

peated his denial of receiving the Summons and Complaint while testifying under oath at the Plenary Hearing. Upon consideration of the statement in the Oral Decision that "the presumption of valid service has not been overcome by clear and convincing evidence' or by any type of credible evidence whatsoever," the conclusion is drawn that the sworn statements made by the Petitioner concerning service were considered to be false. The trial court offered no reason for its dismissal of Petitioners' testimony.

The credibility of the Respondent, however, was never in question by the trial court according to the Oral Decision (T61, L6-4, 12/19/79). In an Affidavit dated October 18, 1979, Respondent, Sylvia Mayer, swore upon her oath that she was personally familiar with the facts contained therein. Said "facts" included

the statement that "On October 2, 1973 Umberto of Naples was served by leaving a copy of the Complaint with Umberto Lombardo, and on October 4, 1973 Mr. Lombardo was individually served by the Essex County Sheriffs' Office."

During cross-examination at the Plenary Hearing, Mrs. Mayer admitted that she had no personal knowledge of whether Mr. Lombardo was served with the Summons and Complaint. Actually the dates on which Mrs. Mayer swore the services took place conflicted with the October 9th date on the Sheriffs' return of service.

The trial court made no comment on the fact that Respondent Sylvia Mayer was less than truthful when she swore upon her oath on October 18, 1979 and made the statements contained in her Affidavit.

The same prejudice appears in the

trial courts' refusal to draw adverse inferences from the failure of the Respondent to produce any evidence to support Respondents' description of the conduct of Petitioner, Lombardo, at meetings to which Respondent, Sylvia Mayer, was admittedly not a party. The meetings took place between attorneys Allen Marra, Esq., and James Piro, Esq. retained by the Respondent during the years 1973 and 1974 and the Petitioner. In the afore-mentioned Affidavit of October 18, 1979 Respondent, Sylvia Mayer made sworn statements that Petitioner, Umberto Lombardo, appeared at a supplemental proceeding at the office of James Piro, Esq. on August 4, 1974, "understood what was happening and adamantly refused to answer any questions." The next sworn statement of this Affidavit describes an offer of $10,000.00 that Mr. Lombardo allegedly made to Allen C. Marra to settle the case.

In cross examination at the Plenary Hearing, Respondent, Sylvia Mayer admitted that she was present at none of the mettings or conversations which she detailed in that Affidavit, therefore she was not "personally familiar" with these "facts" that she swore that she was in the first statement of her Affidavit. Further neither Mr. Marra nor Mr. Piro were called to testify as to the actual content of these meetings and conversations nor was any explanation given for their failure to be produced.

There was no testimony to support the Respondents' conjecture concerning the nature of the supplemental proceeding and nature of the meetings that followed.

Despite this fact, the trial court found that the Petitioner went to a lawyers' office on three occasions, and

each time he "dummies up" and falls back on the claim that he didn't understand what they were talking about. The court found that he knew exactly what was going on at all times and he chose to ignore the Summons and Complaint. (T60, L21-25, 12/19/79; T61, L1-2, 12/19/79).

The trial court never spoke to the question of why the Petitioner would not have sought legal counsel if he did indeed realize that he was attending a supplemental proceeding on August 4, 1974.

The credibility of Respondent, Sylvia Mayer, was never questioned by the Superior Court of New Jersey, though the facts clearly show that Mrs. Mayer was less than truthful when she made her Affidavit. The credibility of Petitioner, Lombardo, on the other hand was suspect though no explanation for that was offered in the Oral Decision of the Honorable Edward F. Neagle,

Jr., when the final determination of the Superior Court of New Jersey was made.

It is the contention of the Petitioner that in light of these facts the statement in the Oral Opinion of the Honorable Edward F. Neagle, Jr., that, "I find the testimony of Mrs. Mayer and her husband completely credible" (T61, L6-7, 12/19/79) indicates application of the law with an unequal hand in favor of the Respondent. The trial court failed to respond in any way to the fact that the Respondent made a false statement under oath.

Immediately prior to delivering the statement of his denial of the Petitioners' Motion to Set Aside Judgment and Vacate Default in his oral decision, the Honorable Edward F. Neagle, Jr., offered that he had "no difficulty in saying that as a result of having observed the demeanor, the manner in which Mr. Lombardo testified and con-

sidering his candor and frankness or more particularly his lack of it, I am denying this motion." (T60, L6-10, 12/19/79)

This statement would seem to indicate that the decision to deny the motion was influenced by the outward behavior of Petitioner, Umberto Lombardo, as observed by Judge Neagle. The trial judge admitted that as a result of having observed Mr. Lombardos' demeanor, the motion was denied.

The denial of the motion resulted in Petitioner, Lombardo, being deprived of having the opportunity to file and Answer to the Complaint against him. He was denied his right to have the case heard on its merits. He was denied Due Process as he is guaranteed in the Fourteenth Amendment of the United States Constitution. He was denied his Right because of discriminatory action on the part of a

trial judge who did not like the outward behavior of the Petitioner and who chose not to respond to the questions concerning the credibility of the Respondents' testimony.

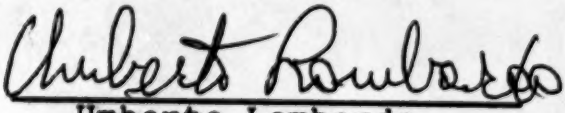
Subsequently the Final Determination of the Superior Court of New Jersey, Law Division — Essex County, denying Appellants' Application to Set Aside Judgment and Vacate Default was submitted to the Appellate Division. In rendering its decision, the Appellate Division stated only that it affirmed substantially for the reasons stated by Judge Neagle in his oral opinion, Per Curiam.

CONCLUSION

For the reasons heretofore expressed, it is respectfully submitted that the Petition for Writ of Certiorari be granted and that the determination of the Honorable Edward F. Neagle, Jr., of the Superior Court of New Jersey, Law Division — Essex County, be reviewed.

Respectfully submitted,

Umberto Lombardo, Pro Se

By: 

Umberto Lombardo

APPENDIX

ORAL DECISION OF

THE HONORABLE EDWARD F. NEAGLE, JR.

DECEMBER 19, 1979

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - ESSEX COUNTY
DOCKET # L 2070 73

SYLVIA MAYER and
EDWARD MAYER,

Plaintiffs

vs.

UMBERTO LOMBARDO,
t/a UMBERTO'S OF NAPLES,

Defendant

THE COURT: All right. It appears from the record in this case that a summons and complaint in the case of Sylvia and Edward Mayer, plaintiffs, against Umberto Lombardo, individually, and trading as Umberto of Naples, were served with summonses and complaints on October 9, 1973. That is what appears from the return of service by the Sheriff. The indication is

that on the return that service was made at 547 Washington Avenue, in Belleville. It further appears that on June 6, 1974, default having been entered, a default judgment was entered against the defendants before Judge Harrison, who is now deceased, in a trial without a jury, nobody appearing on behalf of the defendant.

Now, in 1979 the defendant moves to vacate the judgment and for an order permitting him to file an answer and for whatever other relief might be equitable under the circumstances. The applicable rule is 4:50-1. This rule provides for relief from a judgment such as has been entered in this case or provides that a final judgment may be set aside for the following reasons: (a) Mistake, inadvertance, surprise or excusable neglect; (b) Newly discovered evidence which would probably alter the judgment, order or proceeding and which by due dili-

gence could not have been discovered in time to move for a new trial under Rule 4:49; (c) Fraud, misrepresentation, or other misconduct of an adverse party; (d) The judgment or order is void; (e) The judgment or order has been satisfied, released or discharged, or a prior judgment or order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment or order should have prospective application; or (f) Any other reason justifying relief from the operation of the judgment or order.

4:50-2 provides that the motion shall be made within a reasonable time and for reasons (a), (b) and (c) of Rule 4:50-1 not more than one year after the judgment, order or proceeding was entered or taken. So, not only does the rule indicate, but Counsel indicated at the outset of this proceeding on 11-29-79, that is Counsel for

the defendant, that he was proceeding under Rule 4:50-1 (f), any other reason justifying relief from the operation of the judgment or order.

Plaintiff Sylvia Mayer testified that on June 8, 1973 she lived across the street from the establishment of Mr. Lombardo. That on June 8, in the evening time, that she and her husband were taking a stroll and that they saw a person near the doorway of the particular shop and that she questioned the person as to whether or not he colcred hair and the person said yes and to come in in the morning. She categorically identifies that person as being the defendant, Umberto Lombardo. At the same time, Mrs. Mayer described the sign above the door advertising the place and states that it read Umberto of Naples.

Now, on the next day, that's the 9th, she went to the establishment to have her

hair colored, stripped and processed. She was there most of the day. She states that Mr. Lombardo, whom she identifies as the defendant in this case, worked on her hair except for someone who washed the hair. She goes into detail as to what occurred at the time, that detail is not necessary insofar as this motion is concerned except insofar as it goes to the question of her identification of the defendant as being the one who worked on her hair and she repeats almost each time she answered a question in that area that it was Mr. Lombardo who did whatever had to be done for the particular reason she was at the salon. Then she said that her husband came to pick her up about 5:00 p.m. and that her husband paid Mr. Lombardo for the work done, that she saw and observed Mr. Lombardo speaking to her husband. When questioned about her identification of Mr. Lombardo she states that she remembers his

general appearance and eyes, there was no other men or other persons in the premise and that although she may not be certain or sure about the beard, there's no question in her mind that the person who did the work on her hair was Lombardo. When questioned about the sign she indicated that it appeared that there were two signs and that the Naples sign was over or on top of another sign. She said that although she's near-sighted she drives without glasses, that she has no difficulty whatsoever when wearing glasses and there's no question in her mind that the sign had large letters and these letters read Umberto of Naples.

It appears also from her testimony that some time subsequent to June 9 that she had occasion to look in the telephone book and that book has been marked in evidence, P-1, for the name of Umberto of

Naples and, in fact, that name was in the book and that book is the 1972 telephone book. The purpose, obviously, I gather from her testimony in that area, was to get the proper name in order to turn it over to her attorney. She denies or says that she did not recall seeing Mrs. Poto at any time before the first hearing date in this matter.

Then, Edward Mayer, husband of Sylvia, testified and he corroborates that on June 8, 1973 he was walking with his wife, that he saw the defendant at the doorway, that is Mr. Lombardo, and that an appointment was made for the next day and, again, he also identifies the defendant as the person that they met that day. Then, on the next day, the ninth, he had occasion to call his wife at the establishment because I guess he was going to pick her up and he says that he got the name from the

telephone book, that's P-1 in evidence, or P-1 is a copy of the book that he looked at, and there he found on page 79 of the telephone book Umberto of Naples, Coiffures, the address and telephone number listed. When he went to pick up his wife at 5:00, Lombardo, the same Lombardo according to him was present and he paid the bill and he had a conversation with him and he was in the shop for about five minutes. It develops on cross-examination that on page 79 there also appears in the telephone book the name Zodiac Beauty Salon with the same address and telephone number.

On behalf of the plaintiffs, one William O'Neill testified, he being a private investigator. Called in rebuttal with regard to his testimony that he had been at the shop and spoken to Mr. Lombardo on one or two occasions was Maria Petracca, who is the manager of the shop and she

claims that at the time that she was there he never showed up nor was anybody identified to her or introduced to her by the name William O'Neill.

For the movant Umberto Lombardo, some 40 years old, testified that he's been in the United States for approximately 20 years and he was educated up to the eighth grade in Italy. He does not read English and whatever the letters that were attached to the moving papers, although signed by him, were letters that were written by others in his family. He said that he specializes in cutting women's hair and he gave no permanent waves since 1972 to date and that the Zodiac Beauty Salon was started in that name in December of '71. In 1973 that the business was operated at 547 Washington Avenue in Belleville was in the name of Zodiac, there was no business there known as Umberto of Naples. He said

in 1973 he was unemployed, that he was at the Zodiac and may have cut heads of hair of men. He estimated at one time it was about 100 men he may have cut, but no permanent waves were done, that Poto ordered the supplies, that different people worked in the shop, different men worked in the shop during '73. All of this testimony, of course, was offered to show that there was no such establishment as Umberto of Naples or, in any event, that Mr. Lombardo was not working at the premises on the dates the plaintiff claims he was. The defendant Lombardo admits that he received a telephone call from a Mr. Marra and that Mr. Marra was an attorney and that he was questioned by Marra as to whether anyone had been injured in his shop on a certain day and, in fact, he said that he went to Marra's office. He doesn't recall too much conversation, he didn't speak English too good, he didn't understand Marra too much

and he thought that it might have been something about a person falling in his place and that it was his fault.

In '73, there was another conversation with Marra at Marra's office where he did seem to indicate that he understood someone got hurt and was claiming they were hurt and blaming him. He claims that he stated that he knew nothing about it and he told Marra there was no Umberto of Naples.

In '79, he was told about a judgment from persons who saw the advertisement in the paper by the Sheriff with respect to an execution sale of his premises. That's the first time he knew that anything had occurred, the first time he knew that a judgment had been entered against him according to Mr. Lombardo and, at that time, he spoke to the Sheriff and also retained Counsel. He says, again, that in '73 he doesn't recall and he doesn't think

he received papers and that he wasn't on the premises 547 Washington where the papers were served, talking about the summons and complaint, every day. He also said that when shown D-1 in evidence, the complaint, that he had no recollection of seeing that in 1973. He claims that he was not the owner of Zodiac and repeats that he has no recollection of being served at Zodiac. He only remembers Marra's calls and up to the time of the hearing, the early hearing in this matter, November 29, 1979, he did not know or never heard the name of Mrs. Mayer.

Umberto Lombardo did recall that at one time Marra called him up and he went some place in Nutley and there was another lawyer there who he believes his name was Mr. Piro and that there was some discussion but he didn't understand them. He only remembers, "Lady got hurt", and then after

seeing Marra in Piro's office, he never saw him after that. He denies any discussion about a $10,000 settlement. There was something said about houses, but he said he didn't know anything and he didn't understand them and he went to these conferences or meetings at the lawyer's office by himself and with no interpretor.

He claims that in 1972, Elena, his wife, owned and ran the beauty shop. He doesn't remember collecting any unemployment and he said that in 1973 he didn't cut any women's hair and when asked a little further about this he admitted that he may have done two, three or four cuttings of women's hair.

It developed that in 1970 Lombardo went to a cosmotological school, he said it was a seven day week, he didn't understand English so he was taught in Italian. He said that his wife charged for all the

haircuts and he received nothing from her except for what his wife gave him for clothes and rent. He denies that there was a sign on the premises in 1973 saying Umberto of Naples.

In 1974, he didn't do any work, he was disgusted as he put it. In 1975, he started to work for Zodiac. He also said that in 1973, as far as whatever work he did, that the customers spoke English and, of course, he didn't understand English too well, but he said he did not need to know what the customers said, they didn't have to tell him how to style hair, that he just knew automatically what to do. He said he never told his wife about the telephone calls or about either of the meetings with the attorney.

Then Catirina Poto testified. She's employed by Zodiac from the beginning of 1973. In 1973, she was employed there as a

beautician. She said the owner was Elena Lombardo. The witness, that is Catirina Poto, used to collect the money, she and Mrs. Lombardo used to collect the money and she ordered the supplies and there is a packet of invoices, D-2 in evidence is invoices to the Zodiac for during this period in question. During '73 she said that Umberto Lombardo used to come in to style men's hair, but he cut very little women's hair. She said she didn't know or recognize the plaintiff, Mrs. Mayer. She says that in 1973 the establishment did not operate with the name Naples in it. The end of 1974 the sign went up saying Umberto of Naples. She claims that she knew all the customers in 1973 and would recognize all of them, even if she hadn't worked on them.

William O'Neill, the private investigator alluded to heretofore, testi-

fied that he visited the beauty shop in November 1979 for the purpose of finding out about the property and he saw two signs, one saying Zodiac and one saying Umberto of Naples, one on top of the other. He said he spoke with Lombardo about five minutes concerning the property. He said Lombardo understood the questions well and answered the questions. He was told that Umberto owned a two-family house. He was told that the taxes were a lot of money and what bank or mortgage company held the mortgage. He had no records with him, he just submitted a report and between the two visits to Lombardo's establishment, he had gone to the tax office and had gotten certain information. I can say, quite frankly, I was not very impressed with the testimony of Mr. O'Neill. It's difficult to believe that a stranger like himself would just walk into an establishment, say he was interested in purchasing a property

or interested in a piece of property and the owner would give him such detailed information such as the name of his bank and taxes and other such information.

In the Hodgson against Applegate case cited by Counsel, the Court stated that it is established that a motion under the rule which is the source rule for the present, Rule 4:51, is addressed to the sound discretion of the trial Court, guided by equitable principles and the principles or finality of judgments is one opposed dictates that litigation must eventually be centered and that at some point the prevailing parties be allowed to rely competently on the balance of this judgment, but it is not an absolute rule and it must be weighed in the balance of an equally cited rule that justice should be done in either case. Of course, the Hodgson case can be distinguished from the

facts of this case. In that case the Court had considered that even though the plaintiff had changed judgments because the defendant was unaware of the time that the appeal would run, that the plaintiff had placed his judgment in jeopardy. The Court held that the plaintiff had no right to depend upon the judgment because defendant had attacked threateningly.

158 N.J. Super., 139, In re Estate of Arlinghaus, the Court stated that the "Law contemplates that, when a controversy between parties is once fairly litigated and determined, it is no longer open to relitigation." In that case the defendant's motion to vacate the judgment was denied. The Court said the motion was filed in December of 1976, five years and four months after the application to vacate a judgment had been entered on August 30, 1971. Rule 4:50-2 provides that the motion

shall be made within a reasonable time, not more than one year after the judgment, order or proceeding was entered or taken.

In discussing the particular rule that applies in this case, that is 4:50-1 (f), the Court said in Tenby Chase Apartments vs. N.J. Water Co., 169 N.J. Super., at page 60, that in order that the relief be granted under that section the facts must show exceptional circumstances warranting the granting of the relief.

Counsel for the defendant raises an argument that since he's the movant, the burden is on him, that with regard to the question of service by the Sheriff, the burden, as I understand the argument, the burden shifts to the defendant, or it shifts to the plaintiff in this case and that since the deputy sheriff, or whoever made service, wasn't called, the Clauns adverse inference should be taken by this

Court.

Now, in the Goldfarb case cited by the defendant, the Court said that, "In this jurisdiction, it is settled that the strict English common-law rule does not prevail, and the Sheriff's return is not conclusive. Although it is rebuttable, the Sheriff's return is part of the record and raises a presumption that the facts as therein recited are true." It cites some earlier New Jersey cases where there was a setting aside for lack of convincing proof, only for clear and convincing evidence was it deemed to be false or where the evidence was held to be insufficient. In Goldfarb the Court also held that, "The uncorroborated testimony of the defendant alone is not sufficient to impeach the return. The first question before the Court is whether or not the trial judge soundly determined that the defendant should be held to have

been served. This requires a determination as to whether the evidence adduced at the oral hearing below is so 'clear and convincing' as to impeach the Sheriff's return of service and the affidavit in support thereof." In the Goldfarb case there was an affidavit, in this case we don't have an affidavit, we have a return of service. I deem that there is a presumption of service from the return itself and the question then becomes is whether the testimony is so "clear and convincing" as to impeach the Sheriff's return.

Similarly, in the Vredenburgh vs. Weidman case, 14 N.J. Misc., at page 287 where the question was whether or not there had been service, the Court held that on the affidavit, affidavits having been submitted in that case, that such affidavits, "should not be allowed to

countervail the Sheriff's return, there being every presumption of it correctness." And it should be noted that in Goldfarb, despite the general language that I have referred to, the judgment was reversed. I find this paragraph in that case significant in that respect. The Court said, "All the circumstances of the case, taken with the fact that no great disservice is done plaintiff except for the delay in enforcing the judgment against this defendant, virtually compel the conclusion as a matter of equity that Roeger, Junior, be given his day in court. The judgment is reversed only for the purpose of giving Roeger, Jr., the opportunity of filing an answer and proceeding with the matter on the merits. The statute of limitations would run.

I have no great difficulty in determining that the presumption of valid

service has not been overcome by "clear and convincing evidence" or by any type of credible evidence whatsoever. I have no difficulty in saying that as a result of having observed the demeanor, the manner in which Mr. Lombardo testified and considering his candor and frankness or more particularly his lack of it, I am denying this motion.

Mr. Umberto Lombardo, the testimony was incredible, unbelievable. At the very outset Mr. Lombardo made what may have been a Freudian slip when asked what he did, he said that he was a beautician and then he changed that to hairdresser. It is impossible for me to conclude that the man who has been in this country for 20 years did not understand enough to know that he had been served with a summons and complaint. He did, in fact, and I find that he did receive them and was served with

them and communicated with attorneys about them. That he went to a lawyer's office on three occasions, each time he "dummies up" and falls back on the claim that he doesn't understand English, that he can't read English, he didn't know what they were talking about. He knew exactly what was going on at all times and he chose to ignore the summons and complaint and like so many others it isn't until wages are executed upon, or levied upon, or assets are attacked in one way or another, did he ever come forward.

I find the testimony of Mrs. Mayer and her husband completely credible. I find that, in fact, Mrs. Mayer and her husband, Mr. Mayer, took a walk past the establishment and spoke to Mr. Lombardo on 6-8-73. They arranged for her to come in the next day. I find that she did go in the next day. I find that she was treated and

processed and stripped or whatever by Mr. Lombardo, the defendant here. I find that there was an establishment known as Umberto's of Naples. There's a telephone book with the name in the phone book, the audacity of Mr. Lombardo to deny it in the face of this clear evidence amazes me. The fact that Zodiac is listed in the phone book makes no great impression upon me. To believe that Mr. Lombardo was unemployed during this period of time, that he just went into the shop occasionally and cut men's hair staggers and is an insult to this Court.

It certainly seems to me that once having gone to the lawyer's office, as Mr. Lombardo indicates that he did, and not understanding what they were talking about, that when he got a call to come back the next time, if he couldn't read or understand English, that he would have

taken along someone who could. What was the sense of going the second and third time if the man didn't understand what was taking place each time that he went there?

Then we have another incredible piece of testimony that he went to a beauty school and he didn't understand English, that he was given personal instructions, the only person in the class who was taught in Italian. This man understands what's going on, this man is not retarded in any way, he's smart, very smart. Very conveniently, however, he advises the Court that he speaks English better now than he did in '73 and this started about only two years ago, very convenient indeed. And then again for this Court to believe that with respect to customers in 1973 he didn't understand English in those days but he did do some cutting, however, the customers didn't tell him what they wanted done, that

he could cut the hair without any instructions. That's another little piece of testimony that this Court finds hard to swallow.

Mr. Lombardo first became exercised about this matter when 20 or 30 people told him that there was an advertisement in the paper about the sale of his house. That's when he first became exercised of this. But, I am convinced beyond a reasonable doubt that he was served, that he knew he was served, that he chose not to do anything, that a default was entered in the proper course. The default judgment was entered and accordingly the motion to vacate is denied.

ORDER STAYING SHERIFF'S SALE
FILED FEBRUARY 15, 1980

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - ESSEX COUNTY
DOCKET #L-2070-73

SYLVIA MAYER and
EDWARD MAYER

Plaintiffs

vs.

UMBERTO LOMBARDO
t/a UMBERTO'S OF NAPLES

Defendant

This matter having been brought before the Court by Joel Rinsky, Esq., attorney for Defendant, and the Court having considered the memoranda of Mr. Rinsky and Glen J. Vida, Esq., attorney for the Plaintiffs, the arguments of counsel, and for other good cause shown, it is hereby on the 15th day of February, 1980,

ORDERED that the execution sale of the Defendant's realty located at 567

Washington Avenue, Belleville, New Jersey, be and hereby is stayed pending the Defendant's appeal to the Superior Court of New Jersey, Appellate Division, under the following terms and conditions:

1. That the Defendant keep the first and second mortgages on the property current.

2. That the Defendant deposit with the Clerk of this Court the sum of Five Thousand ($5,000.00) Dollars as a cash bond, to be applied towards the satisfaction of Plaintiff's Judgment in the event that the Defendant is unsuccessful in his present appeal to the Appellate Division.

In the event that either of the above conditions have not been fullfilled, the stay is terminated. The written statement of Defendant's counsel to the effect that all such conditions are being complied with shall be deemed adequate proof thereof.

/s/ _____
EDWARD F. NEAGLE, JR.,
J.S.C.

ORDER FOR JUDGMENT

FILED AUGUST 13, 1974

SUPERIOR COURT OF N.J.
LAW DIVISION: ESSEX COUNTY
Docket No. L-2070-73

Plaintiff

SYLVIA MAYER, et al

vs.

Defendant

UMBERTO LOMBARDO et c.

CIVIL ACTION
ORDER FOR JUDGMENT

This matter being opened to the Court On June 6, 1974, by Citrino, Balsam & Ford, attorneys for plaintiffs, Allen C. Marra, Esq., appearing; and no one appearing on behalf of defendant:

And the Court having taken testimony and received the medical records of the plaintiff in evidence, and good and sufficient cause appearing;

It is on this 12th day of August 1974:

ORDERED, that judgment be and hereby is entered against the defendant, Umberto Lombardo t/a Umberto's of Naples, in favor of plaintiff, Sylvia Mayer in the sum of $15,000.00 and in favor of Edward Mayer, her husband, in the amount of $2,500.00 together with interest and costs of suit.

/S/ _____
J.S.C.

WRIT OF EXECUTION

FILED JUNE 25, 1979

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — ESSEX COUNTY
DOCKET # L 2070-73

SYLVIA MAYER and
EDWARD MAYER,

Plaintiffs

vs.

UMBERTO LOMBARDO
t/a UMBERTO'S OF NAPLES

Defendant

STATE OF NEW JERSEY

TO THE SHERIFF OF THE COUNTY OF ESSEX:

WHEREAS, Judgment was rendered on the 21st day of June, 1974 an order for Judgment was filed on August 13, 1974 in an action in the Superior Court of New Jersey, Law Division, Essex County, between Sylvia Mayer and Edward Mayer, her husband, Plaintiffs, and Umberto Lombardo, trading as

Umberto's of Naples, Defendant, in favor of the said Sylvia Mayer and Edward Mayer, and against the said Umberto Lombardo, t/a Umberto's of Naples, for the sum of $17,500.00 damages, together with lawful interest therefrom, as appears by the Judgment filed in the Office of the Clerk of the Superior Court of New Jersey; and

WHEREAS, Judgment was duly docketed in the Office of the Clerk of the Superior Court of New Jersey on the 21st day of June, 1974, and the sum of $17,500.00 principal, plus interest, is now actually due thereon;

THEREFORE, we command you, that you satisfy the said Judgment out of the personal property of the said Judgment-Debtor within your County; and if sufficient personal property cannot be found, then out of the real property in your County belonging to such Judgment-

Debtor at the time when the said Judgment was so docketed in the Office of the Clerk of this Court, or at any time thereafter, in whosesoever hands the same may be; and that you do pay the monies realized by you from such property to the said Sylvia Mayer and Edward Mayer, or to Glen J. Vida, esq., their attorney, in said action, and return this execution and your proceedings thereon within three (3) months after the date of issuance to the Clerk of the Superior Court of New Jersey, at Trenton.

WE FURTHER COMMAND YOU that, in case of a sale, you may return this Writ with your proceedings thereon before said Court and pay to the Clerk of this Court any surplus in your hands within 30 days after said sale,

WITNESS, the Honorable GEORGE Y. SCHOCH, a Judge of the Superior Court, at Trenton, this 27th day of June, 1979.

/S/ _____
Glen J. Vida, Esq.
Attorney for Plaintiffs

/S/ _____
W. Lewis Bambrick, Clerk

DECISION OF APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1692-79

SYLVIA MAYER and EDWARD MAYER,

Plaintiffs-Respondents,

v.

UMBERTO LOMBARDO, t/a
UMBERTO'S OF NAPLES,

Defendant-Appellant.

Submitted December 22, 1980 —
Decided December 31, 1980.

Before Judges Seidman and Antell.

On appeal from Superior Court, Law Division, Essex County.

Joel C. Rinsky, attorney for appellant.

Glen J. Vida, attorney for respondents.

PER CURIAM

Defendant appeals from an order denying his motion to vacate a default judgment entered in June 1974. Following a plenary hearing the trial judge rejected as

completely unbelievable defendant's testimony that he was never served and did not learn of the judgment until August 1979. On appeal defendant contends that the trial judge mistakenly exercised his discretion principally because plaintiffs failed to offer evidence which would corroborate the sheriff's return of service.

We affirm substantially for the reasons stated by Judge Neagle in his oral opinion. R. 2:11-3(e) (1) (A) & (E).

ORDER DENYING MOTION FOR LEAVE TO FILE
NOTICE OF PETITION FOR CERTIFICATION
AS WITHIN TIME
FILED APRIL 15, 1981

SUPREME COURT OF NEW JERSEY
M-895 SEPTEMBER TERM 1980

SYLVIA MAYER and EDWARD MAYER

Plaintiffs-Respondents,

vs.

UMBERTO LOMBARDO t/a
UMBERTO'S OF NAPLES,

Defendant-Movant.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to file the notice of petition for certification as within time is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 15th day of April, 1981.

ORDER DENYING STAY OF SHERIFF'S
EXECUTION OF SALE
FILED APRIL 15, 1981

SUPREME COURT OF NEW JERSEY
M-896 SEPTEMBER TERM 1980

SYLVIA MAYER and EDWARD MAYER,

Plaintiffs-Respondents,

vs.

UMBERTO LOMBARDO t/a
UMBERTO'S OF NAPLES,

Defendant-Movant.

ORDER

This matter having been duly presented to the Court, it is ORDERED that the motion for stay of sheriff's execution of sale is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 15th day of April, 1981.

Clerk

ORDER DENYING APPLICATION
TO VACATE DEFAULT
FILED DECEMBER 26, 1979

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — ESSEX COUNTY
DOCKET # L 2070 73

SYLVIA MAYER and
EDWARD MAYER

Plaintiffs

vs.

UMBERTO LOMBARDO,
t/a UMBERTO'S OF NAPLES

Defendant

This matter having been brought before the Court by Joel Rinsky, Esq., attorney for Defendant, and the Court having considered the Affidavits of the parties, the legal memoranda submitted by counsel, the testimony of the witnesses, and for other good cause shown, it is hereby on this 26th day of December, 1979,

ORDERED that Defendant's application to vacate the Default Judgment in this

matter be and hereby is denied.

/S/ _____
Edward F. Neagle, Jr.
J.S.C.

NOTICE OF APPEAL
FILED JANUARY 8, 1980

Notice is hereby given that Umberto Lombardo, t/a Umberto's of Naples, the Appellant, does hereby appeal to the Superior Court, Appellate Division, from a determination entered by the Superior Court, Law Division, Essex County, Honorable Edward F. Neagle, Jr., sitting below, wherein the Defendant-Appellant's application to vacate the Judgment previously entered in this matter and Appellant's application to file and Answer, were denied.

JOEL C. RINSKY, P.A.
Attorney for Defendant-Appellant

BY: /S/ JOEL C. RINSKY

I hereby certify that a copy of this Notice of Appeal has been mailed to the

Honorable Edward F. Neagle, Jr., pursuant to R.R. 2:5-1 (b). I further certify that the necessary filing fees required by N.J.S.A. 22A-2 have been paid pursuant to R.R. 2:5-1(f)3.

JOEL C. RINSKY, P.A.
Attorney for Defendant-Appellant

BY: /S/ JOEL C. RINSKY

I hereby certify that an original and copy of the transcript of the oral argument taken in these proceedings on November 2, 1979, November 29, 1979 and December 19, 1979 has been requested from the stenographic reporters and that said testimony is being prepared pursuant to a request made simultaneously with the filing of this Notice of Appeal pursuant to the Rules of Court.

I hereby further certify that said request was made on January 2, 1980 to

Sandy Delgado and Joseph Natale of Rosenberg and Associates for the transcript of November 2, 1979 and that a deposit has been paid to them, along with this request, in the sum of $50.00 and that a request has been made to Patricia Haslbeck for the transcripts of November 29, 1979 and December 19, 1979, and a deposit in the sum of $100.00 has been paid to her. A copy of said request is attached hereto and made a part hereof.

JOEL C. RINSKY, P.A.
Attorney for Defendant-Appellant

BY: /S/ JOEL C. RINSKY

AFFIDAVIT OF UMBERTO LOMBARDO
FILED OCTOBER 12, 1979

STATE OF NEW JERSEY:
SS:
COUNTY OF ESSEX :

UMBERTO LOMBARDO, being duly sworn according to law, upon his oath, deposes and says:

1. On August 29, 1979, it was called to my attention by a friend that saw a notice in the newspaper that there was to be a Sheriff's sale to sell property owned by me at 567 Washington Avenue, Belleville, New Jersey, in order to satisfy a Judgment that was supposedly entered against Umberto Lombardo, t/a Umberto's of Naples, in the sum of $22,540.00. A copy of that newspaper notice is attached hereto. Prior to being advised by a friend of this adver-

tisement in the newspaper, I was not aware of any such Judgment.

2. Upon consulting with counsel, it was determined that we should obtain a copy of the Summons and Complaint and other information and documents pertaining to this matter and same were thereafter obtained. I attach a copy of the Summons and Complaint hereto.

3. The original Complaint filed in this matter, named as a Defendant, Umberto Lombardo, t/a Umberto's of Naples, and further alleges that on June 9, 1973, that I was operating a business located at547 Washington Avenue, Belleville, New Jersey, and that the Plaintiff was injured as a result of the operation of that business.

4. I have never owned a business located at 547 Washington Avenue in Belleville, New Jersey, nor have I ever operated

a business under the name of Umberto's of Naples prior to June of 1973.

5. On June 9, 1973, I was employed at Zodiac Beauty Salon as a hair cutter of men's hair.

6. At no time prior to June 9, 1973, nor on June 9, 1973, did I work on any women's hair or engage in giving of any permanents.

7. I am attaching copies of statements from the Division of Labor and Industry and from Internal Revenue showing the name of Zodiac Beauty Salon at that address and the name of the owner of the business as Elena Lombardo.

8. Although I have been shown a copy of a Sheriff's return indicating service upon me of a Summons and Complaint on October 9, 1973, I have no recollection of receiving such Summons and Complaint.

9. My only recollection is that some time prior to October of 1973, I was called by an attorney who indicated that he represented a person who allegedly sustained injuries in the beauty parlor known as Umberto's of Naples. I told him at that time that I did not know Umberto's of Naples and further told him that I did not own any beauty parlor and that I did not work on women's hair and that I had no knowledge of any incident that occurred on June 9th. Thereafter, I heard nothing further from that attorney and I assumed that my discussion with him had resolved the matter.

10. I was born in Italy and have only had an eighth-grade education and do not speak the English language well nor can I read English well.

11. I had heard nothing further in reference to this matter since 1973 or 1974

and this is the first time that I have become aware that there is this substantial judgment against me.

12. I do not feel that I was involved in any way in this incident if it did occur and I have been advised by my attorney that if I did not own the beauty parlor and if I did not engage in any activities with the Plaintiff involving a permanent, that I would have a valid defense if I had interposed an Answer.

13. Because of my lack of education and because of my conversation with the attorney who contacted me on behalf of the Plaintiff, I was of the belief that I did not have to do anything further subsequent to that conversation and do not have any recollection of receiving any legal documents.

14. I am requesting this Court to

vacate the Judgment and permit me to file and Answer and defend this action and believe that I have a meritorious defense and that it would be inequitable and unjust if you take my property without having had an opportunity to have my day in Court.

/S/ Umberto Lombardo

Sworn and Subscribed to
before me this 12th day
of October, 1979.

/S/ Joel C. Rinsky
Joel C. Rinsky, an Attorney
of the State of New Jersey

AFFIDAVIT OF SYLVIA MAYER
FILED OCTOBER 18, 1979

STATE OF NEW JERSEY:
SS:
COUNTY OF UNION:

SYLVIA MAYER, being of full age, duly sworn upon her oath, according to law deposes and says:

1. I am the Plaintiff in the foregoing action and am personally familiar with the facts contained therein. On June 9, 1973, I had my hair styled by Umberto Lombardo, Defendant in this action. As the result of his gross negligence, all of my hair was caused to fall out. As a result of these grievous injuries I filed an action in Superior Court on September 24, 1973 charging Mr. Lombardo with the negligent treatment of my hair.

2. On October 2, 1973 Umberto of Naples was served by leaving a copy of the Complaint with Umberto Lombardo, and on October 4, 1973 Mr. Lombardo was individually served by the Essex County Sheriff's Office. Annexed hereto please find a copy of the report of Service.

3. After he was served with the complaint, no Answer was filed.

4. Mr. Lombardo speaks English. I know this because I have been in his salon and have had my hair styled by him. In the course of having my hair styled I had spoken to him, and I know for a fact that he speaks and understands the English language. My attorney has shown me copies of letters that he wrote to the Essex County Sheriff's Office, copies of which are annexed hereto. It is obvious that he can not only read English but that he can write the English language.

5. After having had the Complaint served and no Answer recorded, on November 5, 1973 default was entered by my attorneys. A proof hearing was held, with Judgment entered and docketed in June, 1974, in the amount of $17,500.00.

6. Umberto Lombardo was actually aware of the entry of this Judgment in 1974. On August 4, 1974 he was individually served with a Petition and Order for Discovery compelling him to appear in the office of James Piro, Esq., 228 Franklin Avenue, Nutley, New Jersey, at 9:00 o'clock.

7. Mr. Lombardo appeared at this supplemental proceeding, understood what was happening and adamantly refused to answer any question.

8. After that, Alan C. Marra, Esq., my attorney at that time, had numerous con-

versations with Mr. Lombardo. In fact, Mr. Lombardo appeared at his office in October 1974 and offered $10,000.00 to settle this case. I refused this adamantly because of the gross degradation I was forced to suffer with the loss of my hair. I strongly felt that I was entitled to exactly what the court told me the case was worth.

9. Mr. Lombardo now says that he neither speaks nor understands the English language, having been born in Italy. This is a lie. Mr. Lombardo understands the English language, he can speak the English language, he can read the English language and he can write the English language. Anything he may have indicated in his affidavit to the contrary is a lie.

10. The Judgment was obtained because Mr. Lombardo worked on my hair and caused it to fall out. He chose not to answer the

Complaint and I appeared before a Judge in Essex County who awarded me $17,500.00. That was almost six years ago, and now that we have finally found an asset upon which to levy, Mr. Lombardo decides to challenge the complaint. I think this is reprehensible, I think it is unconscionable, and I cannot believe that a court in this country will permit such an injustice to occur.

/S/ SYLVIA MAYER

Sworn and subscribed to
before me this 18th day
of October, 1979.

/S/ Glen J. Vida
Glen J. Vida
An Attorney at Law of New Jersey

REPLY AFFIDAVIT OF UMBERTO LOMBARDO
FILED OCTOBER 24, 1979

STATE OF NEW JERSEY:
SS:
COUNTY OF ESSEX:

UMBERTO LOMBARDO, being duly sworn according to law, upon his oath, deposes and says:

1. I am making this Affidavit in response to the Affidavit filed by the Plaintiff, Sylvia Mayer, and by William O'Neill.

2. In reply to Sylvia Mayer's answering Affidavit, I reiterate that I do not know her and have never worked on her hair.

3. In response to paragraph 4 of Mrs. Mayer's answering Affidavit, I wish to

point out to the Court that the two letters addressed to the Sheriff's Department were written; one by my wife and one by my daughter, and I then signed same, because I cannot write English to any degree.

4. In reply to paragraphs 6 and 7 of Mrs. Mayer's answering Affidavit, I deny that I knew of this Judgment in 1974.

5. In response to paragraph 8 of Mrs. Mayer's answering Affidavit, I deny that I ever offered $10,000.00, or any sum, to settle this case. As a matter of fact, I did not have available in 1974 any monies even close to $10,000.00.

6. In reply to paragraph 3 of Mr. O'Neill's Affidavit, I deny ever speaking with him and certainly could not have told him what the yearly taxes were on the property since, to this day, I do not know what the taxes are since I make mortgage

payments to the bank which include principal, interest and taxes all in one lump sum.

/S/ UMBERTO LOMBARDO
UMBERTO LOMBARDO

SWORN AND SUBSCRIBED TO
before me this 24th day
of October, 1979.

/S/ JOEL C. RINSKY
JOEL C. RINSKY
Attorney at Law of New Jersey

REPLY AFFIDAVIT OF UMBERTO LOMBARDO

I hereby certify that the original of the within Reply Affidavit has been filed with the Clerk of the Superior Court in Trenton and that a clear carbon copy has been filed with the Clerk of Essex County. I further certify that a clear carbon copy has also been served upon CITRINO, BALSAM & DI BIASI, GLEN J. VIDA, ESQ., Attorney for the Plaintiffs, and the Sheriff of Essex County, within the time provided by the rules of Court.

RINSKY & DEL PLATO
Attorneys for Defendant

BY: /S/ JOEL C. RINSKY